IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. STANLY LEWIS BURRELL, Appellant.	No. 38235-1-II UNPUBLISHED OPINION

Van Deren, C.J. — Stanly Burrell appeals his conviction for possession of a controlled substance—methamphetamine. He argues that the trial court improperly admitted his out-of-court statement because the State failed to establish the corpus delicti of the crime. He also argues that there was insufficient evidence to support a finding that he possessed the methamphetamine. Finally, he argues that the trial court denied him his right to counsel when it entered its findings and a determination of Burrell's guilt before allowing defense counsel the opportunity to give a closing statement. We affirm.

FACTS

On June 5, 2008, Vancouver Police Officers Michael Chylack and Dustin Nicholson executed a search warrant at 14703 Northeast 35th Street. On entering the residence, Nicholson went upstairs where a woman, later identified as Karen Phillips, came out of the master bedroom.

Nicholson and Chylack observed drug paraphernalia and a white crystal substance in a camouflage bag inside a blue backpack in the master bedroom. They arrested Phillips for possession of controlled substances, including methamphetamine.

On June 11, Burrell went to the West Precinct of the Vancouver Police Department, where Nicholson read him his *Miranda*[1] rights. Burrell waived his *Miranda* rights and "told [Nicholson] that the drugs and drug paraphernalia that [the police] located in the blue backpack were his, and he wanted his girlfriend, Karen Phillips, to be released." Report of Proceedings (RP) at 20-21. He also mentioned the camouflage bag.

The State charged Burrell with the crime of possession of a controlled substance—methamphetamine. Burrell waived his right to a jury trial and a bench trial began on July 30, 2008.

At trial, Nicholson testified that, while interviewing Phillips in the master bedroom, he observed a blue backpack. "Inside the blue backpack was another bag, a camouflage bag, and then inside both were drug paraphernalia; needles, cotton swabs, plastic Ziploc baggies, glass pipe, and a metal tin that contained a white crystal substance."[2] RP at 12. Nicholson also found "[t]wo plastic baggies containing a white crystal substance and a glass pipe containing a white crystal substance" in the backpack. RP at 16. In the bedroom, he also found a "marijuana pipe, identification for Karen Phillips, and . . . other paper related items." RP at 18. He also observed "several items that had Stanly Burrell's name on them." RP at 10.

Community Corrections Officer Tanis Smith testified that he assisted in the execution of

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[2] Burrell later stipulated to a Washington State Patrol Crime Laboratory report, indicating that the white substance found in the tin container and the pipe tested positive for methamphetamine.

the search warrant on June 5. During the search, Smith "found a tin container [in the blue backpack] [a]nd it had some white crystal substance in it." RP at 38.

Chylack also searched the master bedroom. He found "a glass pipe located in a dresser," RP at 43, containing "[a] burnt residue which [Chylack] believed to be probably methamphetamine." RP at 46. He also located "a Washington [identification card] and [what] looked like some old . . . check stubs . . . at the headboard of the bed." RP at 46. Chylack observed Burrell's name on the identification and the check stubs.

No fingerprints were lifted from any of the seized items. Nicholson testified that his "affidavit for the search warrant reflected drug transactions being involved in that residence . . . includ[ing] transactions by Stanly Burrell." RP at 31. Nicholson confirmed that Burrell was named in the search warrant. Nicholson further testified that "[b]ased on the execution of the search warrant" and the evidence obtained during the search, he was "attempting to locate and arrest Mr. Burrell" before Burrell made contact on June 11. RP at 32.

After the State rested its case, Burrell made a motion to dismiss the charges "[b]ased on the fact that the Prosecution has failed to meet the minimum standard of a preponderance of the evidence, and as a matter of law." RP at 63. The prosecutor responded, "[T]he State feels that the issue of possession isn't the issue. Perhaps there's a corpus delicti issue. But that's separate and distinct from an issue of possession." RP at 65. The trial court stated that "probably the . . . best answer here is, we do closing and [arguments] on the motion at 1:30, and that will give me a chance to review your case authorities."[3] RP at 64.

Following a recess, the trial court directed Burrell to argue his dismissal motion. Upon

[3] It appears that Burrell submitted a written motion to dismiss and a memorandum in support of that motion but neither appears in the record on appeal.

completion of his argument, the prosecutor responded. Burrell was afforded an opportunity to respond to the State's rebuttal and the trial court denied the defense motion to dismiss. The trial court then proceeded:

> The Court: And I assume you want to advance it on to final determination now?
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> [Defense Counsel:] Your Honor, . . . what do you mean by final determination? Am I ready to proceed?
>
> The Court: Well, I'm . . . of the conclusion of the Plaintiff's case. I have to give all deference to the Plaintiff's case at this time, and not necessarily totally weighing all the evidence.
>
> [Defense Counsel:] At this point, Your Honor, you have ruled on the issue. I think we can go forward.
>
> The Court: Okay. Under those circumstances, I make the following findings.

RP at 78-79 (emphasis omitted). The trial court then made numerical findings of fact on the record and stated that "the Defendant . . . was guilty of the crime of Possession of a Controlled Substance." RP at 81. The following discussion then took place:

> [Defense Counsel:] I'm sorry to interrupt, but we haven't closed yet.
>
> The Court: Oh, okay. I asked you --
>
> [Defense Counsel:] Do you think we --
>
> The Court: -- you said you advanced on.
>
> [Defense Counsel:] Oh, I thought you were -- you meant the findings of fact on the record. No, I would like to have the opportunity to close.
>
> The Court: Sure. That's what I asked you, are you . . . are we proceeding forward. I assumed you were waiving that --
>
> [Defense Counsel:] Yes. I'm sorry, Your Honor, I thought you just meant to the formal findings on the --
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> The Court: No, I don't have to make findings on the . . . den[ial] of the motion.
>
> [Defense Counsel:] . . . I would like a chance to close, though.
>
> The Court: Okay. You've heard my findings, you can criticize or comment on any of them.

RP at 81-82. Both parties made short closing statements. The trial court then stated, "Okay. As indicated, adopt the findings as advised, and based upon those findings, I am finding the

Defendant guilty of the crime as indicated." RP at 83.

Burrell was sentenced to 13 months in prison. He appeals.

ANALYSIS

I. Corpus Delicti

Burrell first argues that his June 11 confession "could only be considered [by the trial court] if there was independent prima facie proof of the corpus delicti." He argues that the corpus delicti "required the State to prove [his] ownership, possession or control of the drugs." Br. of Respondent at 11 (emphasis omitted). Because the State did not prove that Burrell possessed the drugs found on June 5, "corpus delicti was not established and [his] conviction should be reversed." Br. of Appellant at 13 (emphasis omitted).

The State argues that, in drug possession cases, corpus delicti does not require a showing of the identity of the person who possessed the drugs. Rather, it only requires the State to show that someone possessed the drugs and, therefore, a crime was committed. Here, it argues, there was evidence that someone possessed methamphetamine. This was sufficient to show that a crime was committed involving possession of methamphetamine and satisfies the corpus delicti requirements. Therefore, Burrell's statement was properly introduced at trial.

A. Standard of Review

We review de novo a trial court's determination of whether the State met its burden under the corpus delicti rule. *State v. Pineda*, 99 Wn. App. 65, 77-78, 992 P.2d 525 (2000). In determining whether there is sufficient independent evidence to satisfy corpus delicti, we review the evidence in the light most favorable to the State. *State v. Aten*, 130 Wn.2d 640, 658, 927 P.2d 210 (1996).

B. Corpus Delicti Satisfied

A trial court may not admit extrajudicial incriminating statements by an accused unless the State presents independent evidence of the corpus delicti of the crime to corroborate the accused's statements. *State v. Brockob*, 159 Wn.2d 311, 327-28, 150 P.3d 59 (2006); *State v. Meyer*, 37 Wn.2d 759, 763, 226 P.2d 204 (1951); *State v. Angulo*, 148 Wn. App. 642, 648-49, 200 P.3d 752 (2009). The corroborating evidence "need not be sufficient to support a conviction, but it must provide prima facie corroboration of the crime," or support a "'logical and reasonable inference'" that the crime occurred. *Brockob*, 159 Wn.2d at 328 (emphasis omitted) (internal quotation marks omitted) (quoting *State v. Aten*, 130 Wn.2d at 656). In other words, the State must present evidence independent of the defendant's incriminating statement that the crime the defendant described actually occurred. *Brockob*, 159 Wn.2d at 328 & n.12.

Proof that a crime has occurred "usually consists of two elements: (1) an injury or loss . . . and (2) someone's criminal act as the cause thereof." *City of Bremerton v. Corbett*, 106 Wn.2d 569, 573-74, 723 P.2d 1135 (1986). In cases involving possession of a controlled substance, the identity of the person who possessed the drugs is not an element of the corpus delicti. *State v. Solomon*, 73 Wn. App. 724, 728, 870 P.2d 1019 (1994). Thus, the State is correct that its burden in satisfying the corpus delicti rule in a drug possession case is to show that *someone* possessed the controlled substance. *Solomon*, 73 Wn. App. at 728; *see also State v. Hamrick*, 19 Wn. App. 417, 418, 576 P.2d 912 (1978).

Here, the State provided sufficient evidence to show that someone at the searched house possessed methamphetamine. Nicholson, Smith, and Chylack testified that they observed a white crystal substance and other drug paraphernalia during a search of Phillips' residence on June 5,

2008. The white substance was later found to be methamphetamine. Phillips was arrested for possession of methamphetamine based on the items found in the blue backpack. The State was not required to show for purposes of corpus delicti that Burrell possessed the methamphetamine.

Because the State showed that someone possessed methamphetamine, it satisfied its burden under the corpus delicti rule. The trial court properly admitted Burrell's incriminating statement and Burrell's argument fails.

II. Sufficiency of Evidence

Burrell argues that, "[a]bsent [his] statements, insufficient evidence was presented to convict him of possession of methamphetamine."[4] Br. of Appellant 15 (emphasis omitted). He argues that "[t]he State did not prove beyond a reasonable doubt that [he] was in constructive possession of methamphetamine," because it failed to present evidence "that he owned the backpack or that he was in its proximity." Br. of Appellant at 19, 20.

The State argues that the evidence was sufficient to prove beyond a reasonable doubt to any rational trier of fact that Burrell had constructive possession of the methamphetamine. It disagrees with Burrell that the evidence must be considered absent Burrell's confession of ownership and argues that Burrell's "admi[ssion] that the drugs belonged to him and to him alone . . . is sufficient to allow the question to go to the trier of fact." Br. of Resp't at 7.

[4] Presumably, Burrell argues that the confession should not be considered because the corpus delicti was not established. But because we find that the State presented prima facie evidence that someone committed the crime of possession of methamphetamine, we consider Burrell's confession in evaluating the sufficiency of the evidence.

A. Standard of Review

"In reviewing the sufficiency of the evidence," we ask whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). "A challenge to the sufficiency of the evidence . . . admits the truth of the [S]tate's evidence and all inferences that reasonably can be drawn therefrom. Furthermore, the evidence is interpreted most strongly against the defendant and in a light most favorable to the [S]tate." *State v. Holbrook*, 66 Wn.2d 278, 279, 401 P.2d 971 (1965).

B. Possession

To prove that Burrell unlawfully possessed methamphetamine, the State had to establish that Burrell (1) possessed (2) a controlled substance. RCW 69.50.4013. Burrell does not challenge the finding that the substance found on June 5 was methamphetamine, a controlled substance. Therefore, we must determine whether there was sufficient evidence for a rational trier of fact to find that Burrell possessed the methamphetamine.

Possession may be actual or constructive. A person has actual possession when he or she has physical custody of the item.[5] *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Burrell was not present when Nicholson and Chylack discovered the drugs. No drugs were found on Burrell's person. Therefore, Burrell did not have actual possession of the methamphetamine.

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[5] In *Callahan*, the Washington Supreme Court found that Callahan did not have actual possession where the drugs were not found on his person, but where Callahan "told one of the officers that he had handled the drugs earlier." *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969).

> Since the drugs were not found on the defendant, the only basis on which the jury could find that the defendant had actual possession would be the fact that he had handled the drugs earlier and such actions are not sufficient for a charge of possession since possession entails actual control, not a passing control which is only a momentary handling.

Callahan, 77 Wn.2d at 29.

A person has constructive possession when he or she has dominion and control over the item. *Callahan*, 77 Wn.2d at 29. Courts determine whether a person has dominion and control over an item by considering the totality of the circumstances. *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977).

One indication of dominion and control is that the person has ownership or control over the premises where the contraband was found.[6] *See State v. Huff*, 64 Wn. App. 641, 653-54, 826 P.2d 698 (1992). Another is the person's ability to immediately reduce the contraband to actual possession. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). Mere proof of proximity to the controlled substance is insufficient to establish possession. *State v. Bradford*, 60 Wn. App. 857, 862, 808 P.2d 174 (1991). But an individual's absence during the discovery of the contraband evidence does not alone demonstrate a lack of dominion and control over it. *See, e.g.*, *State v. Simonson*, 91 Wn. App. 874, 877, 881-82, 960 P.2d 955 (1998). And dominion and control need not be exclusive. *State v. Cote*, 123 Wn. App. 546, 549, 96 P.3d 410 (2004).

State v. Edwards, 5 Wn. App. 852, 490 P.2d 1337 (1971) is instructive. In *Edwards*, Edwards's girlfriend was temporarily staying at her step-father's residence; Edwards "was not a guest in the . . . home." *Edwards,* 5 Wn. App. at 853. Police searched the home and found a suitcase containing heroin. *Edwards*, 5 Wn. App. at 853. Edwards "admitted to the police he owned the bag in which the [drugs] w[ere] found." *Edwards*, 5 Wn. App. at 855. Division Three of this court held that Edwards's admission of ownership of the bag in which the drugs were found was sufficient to conclude that Edwards had constructive possession of the drugs: "It is

[6] Residence at a premises is not "established from ownership of a few items of property found there, which are not of the clothing or . . . toilet[ry] type." 13A Seth A. Fine & Douglas J. Ende, Washington Practice: Criminal Law § 906, at 175 (2d ed. 1998).

reasonable to infer the owner of property retains sufficient dominion and control over it to have possession of it and its contents." *Edwards*, 5 Wn. App. at 855.

Here, as in *Edwards*, Burrell admitted ownership of the backpack and its contents. He described the backpack and mentioned the camouflage bag to Nicholson; both matched the items found in Phillips' master bedroom. Further, the presence of Burrell's identification and check stubs in the master bedroom where the items were found supported an inference that Burrell had been present in the master bedroom at some previous time. Considering the totality of the circumstances and the evidence in the light most favorable to the State, the evidence was sufficient to support a rational fact finder's finding that Burrell had constructive possession of the backpack and the drugs contained within it. Therefore, we affirm the trial court's finding that Burrell possessed methamphetamine.

III. Right to Counsel

Burrell argues that the trial court denied him his Sixth Amendment right to counsel when it "refuse[d] to hear [his counsel's] closing argument." Br. of Appellant at 22. He argues that the error was not remedied when the trial court allowed defense counsel to make a closing argument after its "ultimate determination finding Mr. Burrell guilty." Br. of Appellant at 23. He argues that the violation of his right to counsel requires that his conviction be vacated and remanded for a "new trial . . . before a different judge." Br. of Appellant at 22.

The State argues that "[t]his was simply a misunderstanding that was corrected by the court." Br. of Resp't at 9. It argues that "the court did not make a finding of guilt until after both sides had had an opportunity to present" closing arguments.[7] Br. of Resp't at 9. Further, the

[7] The State asserts that the trial court had not yet "ma[de] a finding of guilt" when Burrell's counsel requested closing arguments. Br. of Respondent at 9. This is not supported by the

State argues that "the trial court is in the best position to determine whether or not the circumstances . . . ha[ve] deprived the defendant of a fair trial." Br. of Resp't at 10. "The trial court in a bench situation is usually given broad discretion in how it wants to look at the evidence and the sequencing of presentation." Br. of Resp't at 11.

A. Standard of Review

"We review constitutional questions de novo." *State v. Castro*, 141 Wn. App. 485, 490, 170 P.3d 78 (2007). Where a constitutional error has occurred, we apply the constitutional harmless error standard. *State v. Guloy*, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985). Constitutional errors are presumed prejudicial; to overcome this presumption, the State must show beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007); *State v. Binh Thach*, 126 Wn. App. 297, 312-13, 106 P.3d 782 (2005).

B. No Sixth Amendment Violation

The Sixth Amendment of the United States Constitution protects a defendant's right "to have the assistance of counsel." U.S. Const. amend VI. "This right to counsel encompasses the delivery of closing argument." *State v. Frost*, 160 Wn.2d 765, 768, 161 P.3d 361 (2007), *cert. denied sub nom. Frost v. Washington*, 128 S. Ct. 1070 (2008). "[C]losing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. . . . And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt." *Herring v. New York*, 422 U.S. 853, 862, 95 S. Ct.

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record. The trial court entered oral findings of fact and concluded that "the Defendant, through ownership of the drugs in question, was guilty of the crime of Possession of a Controlled Substance, to wit, methamphetamine." Only after this statement did defense counsel state, "We haven't closed yet." RP at 81.

2550, 45 L. Ed. 2d 593 (1975). Trial courts may limit the scope of closing arguments but "a limitation that goes too far may infringe upon a defendant's Sixth Amendment right to counsel." *Frost*, 160 Wn.2d at 768.

Burrell relies on *Herring* to support his argument. In *Herring*, the United States Supreme Court considered the constitutionality of a New York statute that "confer[red] upon every judge in a nonjury criminal trial the power to deny counsel any opportunity to make a summation of the evidence before the rendition of judgment." 422 U.S. at 853. The Court held that "a total denial of the opportunity for final argument in a nonjury criminal trial is a denial of the basic right of the accused to make his defense." *Herring*, 422 U.S. at 859, 862-63. But the Court noted that "[t]he presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations." *Herring*, 422 U.S. at 862.

Here, the trial court misunderstood Burrell's counsel's response to its question about how to proceed as a waiver of closing argument. The prosecutor also understood defense counsel's comments as a waiver of closing argument. But immediately upon defense counsel's objection, the trial court afforded both parties the opportunity to present closing statements. Though the trial court had already articulated a decision on Burrell's guilt, the trial court suspended its decision and allowed both counsel the opportunity to "sharpen and clarify the issues," including defense counsel's attempt to persuade the trial court that a reasonable doubt existed regarding Burrell's guilt. *Herring*, 422 U.S. at 862. The fact that closing arguments did not cause the trial court to change its earlier determination does not amount to denial of the right to counsel provided by the Sixth Amendment.

Because the trial court did not intend to deprive Burrell of his right to counsel and because

defense counsel was provided an opportunity to present a closing argument, the trial court's misunderstanding did not result in "a total denial of the opportunity for final argument." *Herring*, 422 U.S. at 859. Therefore, the trial court did not violate Burrell's right to counsel and his argument fails.

C. Constitutional Harmless Error

Even if the trial court erred in failing to allow defense counsel to present a closing argument prior to a finding of guilt, any error was harmless.

Constitutional error is harmless where, on review, we are convinced beyond a reasonable doubt that a reasonable fact finder would have reached the same result absent the error. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996); *State v. Aumick*, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995). "A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947).

Here, Burrell's counsel argued a motion to dismiss the charge prior to the trial court's final determination. During that argument, defense counsel discussed the State's failure to provide prima facie evidence of the corpus delicti and its failure to present sufficient evidence of Burrell's possession. After the prosecutor responded to Burrell's motion, the trial court afforded Burrell's counsel the opportunity to rebut the State's arguments. Essentially, Burrell was given two opportunities to try to persuade the trial court that Burrell should not be found guilty in light of the State's evidence. The trial court then mistakenly understood Burrell to have waived his closing argument but, upon realizing its mistake, allowed both parties to give closing arguments. At that time, Burrell's counsel again argued that the evidence was insufficient to prove beyond a

reasonable doubt that Burrell possessed the methamphetamine.

Because the trial court inadvertently moved forward with its final determination without allowing for closing arguments and because Burrell was afforded the opportunity to present his argument during his motion to dismiss and after the trial court articulated its findings, we hold that any error was harmless.

We affirm Burrell's conviction for possession of methamphetamine.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Quinn-Brintnall, J.

Appelwick, J.